Nos. 07-1059 & 07-1078

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EURODIF S.A., *et al.*,
Respondents.

USEC, INC., *et al.*,
Petitioners,

v.

EURODIF S.A., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT THE AD HOC UTILITIES GROUP

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QUESTION PRESENTED

Whether the court of appeals was correct in holding that under the plain language of the antidumping statute, 19 U.S.C. § 1673, contracts for the sale of uranium enrichment services are not sales of merchandise, and therefore such sales are not subject to the statute.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the members of the Ad Hoc Utilities Group joining in this Brief in Opposition list their respective parent companies and nonwholly owned publicly traded subsidiaries as follows:

1. The parent company of Arizona Public Service Company is Pinnacle West Capital Corporation. Arizona Public Service Company has no publicly-traded nonwholly owned subsidiaries.

2. The parent company of respondent Dominion Energy Kewaunee, Inc. is Dominion Resources, Inc. Dominion Energy Kewaunee, Inc. has no publicly-traded nonwholly owned subsidiaries.

3. The parent company of respondent Dominion Nuclear Connecticut, Inc. is Dominion Resources, Inc. Dominion Nuclear Connecticut, Inc. has no publicly-traded nonwholly owned subsidiaries.

4. The parent company of respondent Duke Energy Carolinas, LLC is Duke Energy Corporation. Duke Energy Carolinas, LLC has no publicly-traded nonwholly owned subsidiaries.

5. The parent company of respondent Entergy Services, Inc. is Entergy Corporation. Entergy Services, Inc. has no publicly-traded nonwholly owned subsidiaries.

6. Respondent Exelon Corporation has no parent and one subsidiary with publicly traded preferred stock: PECO Energy Company.

7. The parent company of respondent Florida Power & Light Company is FPL Group, Inc. Florida Power & Light Company has no publicly-traded nonwholly owned subsidiaries.

8. Respondent Nebraska Public Power District has no parent or publicly-traded nonwholly owned subsidiaries. It is a political subdivision of the State of Nebraska.

9. The indirect or ultimate parent company of respondent PPL Susquehanna, LLC is PPL Corporation. PPL Corporation has one nonwholly owned subsidiary that is publicly traded: PPL Electric Utilities Corporation.

10. The parent company of respondent Progress Energy Carolinas, Inc., formerly known as Carolina Power & Light Company, is Progress Energy, Inc. Progress Energy Carolinas, Inc. has no publicly-traded nonwholly owned subsidiaries.

11. The parent company of respondent Progress Energy Florida, Inc., formerly known as Florida Power Corporation, is Progress Energy, Inc. Progress Energy Florida, Inc. has no publicly-traded nonwholly owned subsidiaries.

12. The parent company of respondent Southern California Edison Company is Edison International. Southern California Edison Company has no publicly-traded nonwholly owned subsidiaries.

13. The parent company of respondent Southern Nuclear Operating Company, Inc. is The Southern Company. Southern Nuclear Operating Company, Inc. has no publicly-traded nonwholly owned subsidiaries.

14. The parent company of respondent Union Electric Company, d/b/a AmerenUE, is Ameren Corporation. Ameren Corporation has three subsidiaries that have publicly traded preferred stock: Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Company d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP.

15. The parent company of respondent Virginia Electric & Power Company is Dominion Resources, Inc. Virginia Electric & Power Company has no publicly-traded nonwholly owned subsidiaries.

16. The parent companies of respondent Wolf Creek Nuclear Operating Corporation are Westar Energy, Inc. and Great Plains Energy Incorporated. Wolf Creek Nuclear Operating Corporation has no publicly-traded nonwholly owned subsidiaries.

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Respondent the Ad Hoc Utilities Group ("AHUG") is comprised of sixteen American utilities that represent the majority of commercial nuclear power generation in the United States.[1] AHUG respectfully submits this brief in opposition to the briefs submitted by the United States ("Government") and USEC Inc. and the United States Enrichment Corporation (collectively, "USEC").[2]

STATEMENT OF THE CASE

This case involves an administrative proceeding under the provisions of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1673.[3] Those provisions authorize the Government to impose offsetting customs duties ("antidumping duties") when the Department of Commerce ("Commerce") finds, among other conditions,

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[1] The members of the Ad Hoc Utilities Group are Arizona Public Service Company; Dominion Energy Kewaunee, Inc.; Dominion Nuclear Connecticut, Inc.; Duke Energy Carolinas, LLC; Entergy Services, Inc.; Exelon Corporation; Florida Power & Light Company; Nebraska Public Power District; PPL Susquehanna, LLC; Progress Energy Carolinas, Inc.; Progress Energy Florida, Inc.; Southern California Edison Company; Southern Nuclear Operating Company; Union Electric Company (d/b/a AmerenUE); Virginia Electric & Power Company; and Wolf Creek Nuclear Operating Corporation.

[2] The Government's and USEC's briefs are cited herein as "Gov't Brief" and "USEC Brief," respectively. The Confidential and Public Joint Appendices are cited respectively as "C.J.A." and "J.A." USEC's and the Government's appendices included with their petitions for a writ of certiorari are cited as "USEC App." and "Gov't App.," respectively.

[3] All statutory references contained herein are to Title 19 of the United States Code (2000), unless otherwise noted.

that imports of foreign merchandise are being sold at a lower price in the United States than they are sold in the home country market of the foreign producer or exporter.

The antidumping proceedings at issue were initiated by Commerce in 2000 as a result of a petition brought by USEC, a privatized entity that inherited the U.S. Government's monopoly on the supply of U.S. and Russian enrichment services, against USEC's two main competitors.[4] In its petition USEC claimed that Eurodif S.A. ("Eurodif") and Urenco GmbH ("Urenco") were importing low enriched uranium ("LEU") from France, Germany, the Netherlands and the United Kingdom and selling that LEU in the United States for less than fair value. In the antidumping proceedings Commerce treated purchases by American electric utility companies of a foreign manufacturing service – the enrichment of the utilities' uranium for ultimate use in their commercial nuclear reactors – as though such service transactions were purchases of LEU. On appeal, the Court of Appeals for the Federal Circuit ("Federal Circuit") concluded that the antidumping statute unambiguously does not apply to sales of services, and that the contracts at issue were clearly for the sale of enrichment services, not LEU.

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[4] While USEC is a U.S. company, much of the enrichment services it provides to U.S. utilities are actually supplied by Russia. *See USEC Prospectus* (1998), J.A. 77, 83.

A. The Antidumping Law

The antidumping statute authorizes Commerce to impose antidumping duties if it "determines that a class or kind of [imported] *merchandise is being*, or is likely to be, *sold* in the United States at less than fair value," and if the U.S. International Trade Commission also separately determines that such sales cause material injury or a threat of material injury to the U.S. industry producing a similar product domestically. 19 U.S.C. § 1673 (emphasis added). In general, merchandise is deemed sold at less than fair value if the price at which that merchandise is sold in the United States is less than the price at which it is sold in the exporter's home country. *See* 19 U.S.C. § 1677(35)(A) (defining the dumping margin as the amount by which the home market price ("normal value") exceeds the U.S. price ("export price" or "constructed export price")).[5]

The purpose of the dumping law is to determine, based on an examination of actual sales, whether the price for imported goods sold in the United States is unfairly low, and if so to impose antidumping duties on

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[5] "Export price" is "the price at which the subject merchandise is first sold . . . before the date of importation by the producer or exporter . . . outside of the United States to an unaffiliated purchaser . . . ." 19 U.S.C. § 1677a(a). "Export price" is generally used when the seller is outside the United States. "Constructed export price" is "the price at which the subject merchandise is first sold . . . in the United States . . . by or for the account of the producer or exporter . . . to a purchaser not affiliated with the producer or exporter . . . ." 19 U.S.C. § 1677a(b). "Constructed export price" is generally used when the seller is in the United States.

imports of those goods to offset the lower price. In determining whether imported goods are being sold in the United States at less than "fair value," the concept of sales price is central. A determination of dumping cannot be made unless there is both a "price setter" – *i.e.*, a party potentially responsible for dumping – and a sale of subject merchandise in the United States for less than the foreign market price for those goods. *See* 19 U.S.C. § 1673; Response To Court Remand, *Taiwan Semiconductor Mfg. Co. v. United States*, Slip Op. 00-48, Consolidated Court No. 98-05-02184 (June 30, 2000) ("*TSMC Remand Redetermination*") at 4 (text between nn.5-6), *available at* http://ia.ita.doc.gov/remands/00-48.htm. The law provides detailed rules on how prices for subject merchandise are to be analyzed and compared on an "apples-to-apples" basis, including how adjustments are made to account for differences in such factors as transportation costs and quantity discounts, and whether sales are made at the wholesale or retail level. *See* 19 U.S.C. §§ 1677a-1677b. Accordingly, the law requires a specific examination of each sale of merchandise, and the price of that sale, to support a determination that the sales are being made at less than fair value.

Manufacturing services transactions are not unusual in antidumping proceedings, and in 1997 Commerce issued a regulation formalizing its practice in applying the antidumping statute to those arrangements. This "tolling regulation" distinguished between sales of merchandise, which are relevant in an antidumping analysis, and sales of toll manufacturing services associated with such merchandise, which are not. The tolling regulation provided in pertinent part

that "[Commerce] will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." 19 C.F.R. § 351.401(h) (2007).[6] Prior to this case, Commerce consistently relied on the tolling regulation to conclude that contracts for toll manufacturing services were not sales of the resulting merchandise. *See, e.g., Dynamic Random Access Memory Semiconductors of One Megabit and Above ("DRAMs") From Taiwan*, 64 Fed. Reg. 56,308, 56,318 (Dep't of Commerce Oct. 19, 1999) (treating toll manufacturing as the sale of a service, not as sales of merchandise). On that basis, Commerce has consistently determined that toll services transactions cannot be used to assess whether subject merchandise is being sold at less than fair value. *See, e.g., TSMC Remand Redetermination* at 4 (text between nn.8-9) (*"[W]e do not consider the 'sale' between the [toll services] subcontractor and such a contractor to be a sale of subject merchandise at all."*) (emphasis in original).[7]

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[6] The tolling regulation defines which parties are the "producers" of subject merchandise so Commerce can identify them as the price setters and use their transactions as the basis for its dumping determination. *See* 19 U.S.C. § 1677a (basing export price on sales by exporters or producers); 19 U.S.C. § 1677b (basing normal value on values from exporters or producers).

[7] *See also Taiwan Semiconductor Mfg. Co. v. United States*, 143 F. Supp. 2d 958, 966 (Ct. Int'l Trade 2001) ("Commerce's use of 'relevant sale' . . . furthers congressional intent for Commerce to determine whether subject merchandise is being, or is likely to be, sold in the United States at less than its fair value.").

In March 2008, over seven years after the initiation of the underlying antidumping proceeding, Commerce published a Federal Register notice withdrawing the tolling regulation, citing this case as the justification. Commerce nonetheless stated it will continue to apply the principles of the cancelled regulation on a "case-by-case" basis. *Withdrawal of Regulations Governing the Treatment of Subcontractors ("Tolling Operations")*, 73 Fed. Reg. 16,517 (Dep't of Commerce Mar. 28, 2008).

B. Uranium Enrichment

Enrichment of uranium is one of four intermediate manufacturing processes in the production of fuel rod assemblies. Such assemblies are used in nuclear reactors to heat water and produce steam, which in turn passes through turbines to generate electricity.

Typically, utilities arrange for the production of nuclear fuel rod assemblies by purchasing uranium and then separately contracting for conversion, enrichment and fabrication services to be performed on that uranium. The utility generally begins the production process by purchasing a quantity of milled uranium ore from a mining company. It then contracts with a conversion service provider to chemically transform the milled uranium into gaseous uranium hexafluoride (UF_6), commonly referred to as uranium "feedstock." Next, the utility separately contracts with an enrichment service provider to enrich the UF_6 in the fissionable isotope U^{235} to a level specified by the utility. As a final step, the utility contracts with a fabrication service provider to chemically transform the enriched UF_6 into an oxide, press the oxide into pellets, encapsulate the

pellets in tubes, and bundle the tubes into fuel assemblies for insertion in the utility's nuclear reactors. *USEC Prospectus* (1998), J.A. 81. The utility retains ownership of the uranium in all of its chemical forms throughout these stages of nuclear fuel production ("fuel cycle"). *Cf.* USEC Letter to Commerce (Dec. 8, 1997), J.A. 137 ("[E]nriched uranium *per se* is generally not sold within the United States. Instead, utilities typically obtain nuclear fuel by purchasing natural uranium and conversion, enrichment and fabrication services separately.").[8]

All mined uranium originally contains 0.711 percent of fissionable isotope U^{235}. Enrichment is the process by which a quantity of uranium is separated into two

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[8] As an alternative to enrichment services contracts, utilities occasionally purchase LEU as a whole through a contract for "enriched uranium product" ("EUP"). Under an EUP contract, ownership of the LEU is transferred from the enricher to the utility, and the utility pays the seller a price that reflects all elements of the LEU's value, including the milled uranium, the conversion services, and the enrichment services. *See USEC Inc. v. United States*, 259 F. Supp. 2d 1310, 1314-15 (Ct. Int'l Trade 2003) ("*USEC I*"), Gov't App. 178a, 182a-84a; C.J.A. 333-36. The enricher provides the uranium for enrichment in an EUP contract, pays property taxes on the uranium during enrichment, and bears the risk of price fluctuations in that uranium's value. C.J.A. 332. EUP contracts are relatively rare, and are generally for small amounts needed to supplement a utility's enrichment supply. *Cf.* C.J.A. 388; *USEC Annual Report* (2009), J.A. 53 ("Although customers may buy enriched uranium product without supplying uranium, most of USEC's contracts are for enriching uranium provided by customers."). The application of the antidumping law to EUP transactions is not at issue in this proceeding.

"streams," one with a higher concentration of U^{235} (the product stream) and one with a lower concentration of U^{235} (the waste stream or "tails"). This process involves a trade-off between the amount of uranium feedstock provided and the amount of energy expended (the energy is referred to as Separative Work Units, or "SWUs"). Enrichment can produce LEU with a specific U^{235} concentration (or "assay") by using either less uranium feedstock and more SWU (to separate more U^{235} from the waste stream), or more uranium feedstock and less SWU.[9] *See USEC Prospectus* (1998), J.A. 80 ("SWU . . . and natural uranium are, to a certain extent, interchangeable in the process to create enriched uranium.").[10] When purchasing enrichment services,

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[9] Enrichment is comparable to squeezing juice from oranges, in that the same amount of juice can be made using either more oranges and less squeezing, or fewer oranges and more squeezing. The same amount of LEU can be produced using very different amounts of SWU, depending on the amount of uranium feedstock provided by the enrichment service customer.

[10] During the antidumping proceeding at issue, enrichment was approximately 60 percent of the value of LEU. *Low Enriched Uranium from France*, 66 Fed. Reg. 65,877 (Dep't of Commerce Dec. 21, 2001) ("*Final Determination*"),Gov't App. 238a. The price of milled uranium ore increased from under $8 per pound in 2000 to a high of $136 in June 2007 before declining to $64.50 (800 percent of its 2000 price) in September 2008. As a result of this eightfold increase in price, uranium feedstock now represents a much greater portion of the LEU's value. *See* Ux Consulting, *Ux Current and Historical Price Indicators*, http://www.uxc.com/review/uxc_g_price.html. Prior extreme price fluctuations in uranium resulted in Westinghouse breaching numerous contracts with U.S. utilities for nuclear

(Cont'd)

utilities achieve their desired balance by specifying the level of enrichment for the product derived from the feedstock and the level of depletion for the waste. Utilities adjust the amount of uranium feedstock to provide and the amount of SWUs to purchase on an order-by-order basis in order to manage their uranium inventories and fuel cycle costs. *See, e.g.*, C.J.A. 10-12.[11]

Under enrichment services contracts, the utility retains ownership of the uranium feedstock it provides to the enricher. *See USEC Annual Report* (2000), J.A. 58 ("Generally, title to uranium provided by customers for enrichment purposes does not pass to USEC.").[12] Because the enricher does not own the uranium, it does not report the uranium as an asset on its books, does not know its value, and has no legal duty

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(Cont'd)

fuel. *See Fla. Power & Light Co. v. Westinghouse*, 579 F. 2d 856, 857-58 (4th Cir. 1978); Taylor & Yokell, *Yellowcake: The International Cartel* 119-25 (1979). This situation reinforced the utilities' desire to contract separately for the uranium and the services applied to that uranium.

[11] The value of the uranium feedstock can vary considerably, because utilities purchase uranium under long-term contracts from a variety of sources in different countries at different prices. *See USEC I*, 259 F. Supp. 2d at 1314-15, Gov't App. 182a-84a.

[12] Enrichers in this regard are analogous to banks: they cannot assert ownership over the items (uranium or cash) deposited with them by their customers, even though those items may be fungible and the customers might not receive the exact same items (atoms of uranium or dollar bills) that they originally deposited.

to pay property, sales, or income taxes on it. *See id.*, J.A. 58 (indicating that USEC does not treat uranium for which it does not hold title as an asset on its balance sheet); AHUG Letter to Commerce (Apr. 5, 2001), J.A. 179 (explaining that utilities do not inform enrichers about the value of feedstock they provide for enrichment); USEC Property Tax Letter (Nov. 19, 1998), J.A. 128 ("USEC will report all the property that it owns at the two [enrichment plants] and will pay property tax accordingly. USEC does not intend to report any UF_6 to which it does not hold legal title.").

The industry practice of purchasing enrichment services separately from uranium was originally established by the U.S. Government. When utilities sought regulatory approval for their first nuclear reactors in the 1960s, they committed to long-term enrichment services contracts with the Atomic Energy Commission, predecessor to the Department of Energy,[13] which at the time was the monopoly provider of enrichment services. *See* Taylor & Yokell at 33; Commerce Hearing Transcript (Oct. 31, 2001), J.A. 278. Until the 1980s, utilities had no real option but to obtain 100 percent of their enrichment services needs from DOE. In 1984, DOE changed its practice and offered a new model contract allowing utilities to purchase up to 30 percent of their uranium enrichment services from other suppliers. AHUG Common Issues Brief, J.A. 273-74. Through this change, DOE specifically permitted utilities to diversify the risks of supply disruption by contracting with other enrichment suppliers.

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[13] Both the Atomic Energy Commission and the Department of Energy are referred to herein as "DOE."

Because uranium atoms are commingled in every phase of the nuclear fuel production process, ownership cannot be tracked physically. Instead, just as the financial system uses accounts to track ownership of money, uranium industry participants and government regulators rely on accounts to track both the ownership and national origin of uranium at each step in the nuclear fuel cycle. *Cf.* USEC Property Tax Letter, J.A. 129-30 (relying on feed balances to determine what uranium in its inventory is owned by each utility); USEC Letter to Commerce (Dec. 8, 1997), J.A. 138-40 (describing the importance of industry account-based systems for tracking uranium and its origin). The uranium atoms transferred after conversion, enrichment and fabrication may be different from the atoms initially provided by the utility for processing, but the contracts-based accounting system allows uranium ownership and origin to be tracked throughout the nuclear fuel cycle.[14]

Without this contracts-based accounting system for tracking ownership and origin of uranium being transferred between accounts, converters, enrichers and fabricators could not commingle uranium during the nuclear fuel cycle. *Cf.* USEC Letter to Commerce (Dec. 8, 1997), J.A. 139-40. They would have to physically segregate the uranium owned by each different utility, processing it in batches rather than as a continuous stream. Such a batch-oriented approach would be cost prohibitive, if not physically impossible, because enrichers, for example, would have to shut down the enrichment cascade and restart it for each batch of uranium provided by a utility.

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[14] Under this account-based tracking system, transfers of uranium during the nuclear fuel production cycle are often made through "book transfer" between accounts at different service providers. *See, e.g.*, C.J.A. 13, 15.

The contract-based accounting system is also crucial to the ability of industry members to comply with the multitude of regulatory requirements that are based on tracking the origin and processing of their uranium.[15] For these reasons, the ownership rights and obligations reflected in industry contracts are an essential element of both the industry and its regulation by government and international bodies.

C. The Proceedings Below

Having initiated the underlying proceeding in 2000, Commerce published its *Final Determination* in the antidumping proceeding involving France on December 21, 2001. Gov't App. 220a-62a. Commerce's determination that Eurodif had made sales at less than fair value was based primarily on sales of enrichment services.

Commerce stated that "[w]hile we recognize that the provision of uranium feedstock may not be a payment-in-kind in the formal sense under these contracts, we maintain that the arrangement between buyer and seller in a SWU contract nonetheless is dedicated to the delivery of LEU, and critical to the trade in LEU." *Final*

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[15] *See, e.g.*, 42 U.S.C. § 2156(2) (2000), which prohibits the use of nuclear materials exported from the United States in any nuclear explosive device. Once U.S. uranium is commingled with uranium from other sources, the only way to enforce this restriction is through the tracking of origin in uranium accounts. In fact, for each delivery of LEU, the enricher separately accounts for the origin and amount of uranium feed and enrichment services associated with that feed. *See also* 10 C.F.R. § 110.32(c) (2008) (requiring tracking of country of origin for imported or exported nuclear material and processing through Nuclear Regulatory Commission license).

Determination, 66 Fed. Reg. at 65,884-65,885, Gov't App. 254a-55a. It was uncontested that the utilities did not sell the LEU produced from their feedstock, but rather consumed it in their own reactors. Nonetheless, Commerce concluded that "[i]t does not matter whether [Eurodif] sold subject merchandise as subject merchandise, or whether [Eurodif] sold some input or manufacturing process that produced subject merchandise, as long as the result of [Eurodif's] activities is subject merchandise entering the commerce of the United States." *Id.* at 65,879, Gov't App. 232a.

The Court of International Trade ("CIT") disagreed. It examined the enrichment contracts and concluded they were unquestionably sales of services. The CIT could not reconcile Commerce's application of the antidumping law to enrichment services transactions with prior cases in which Commerce itself had determined that transactions in toll services were not sales of subject merchandise. Specifically, the CIT noted that Commerce had previously recognized that "where the price paid for subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law." *USEC I*, 259 F. Supp. 2d at 1325, Gov't App. 205-06a. The CIT remanded the case to Commerce for reconsideration. *Id.* at 1331, Gov't App. 219a.

On remand, Commerce reaffirmed its prior conclusions, asserting that "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value." *Low Enriched*

Uranium from France Remand Redetermination (Dep't of Commerce June 23, 2003) ("*Remand Redetermination*"), Gov't App. 126a. On appeal, the CIT again rejected Commerce's approach, stating:

> Commerce's duty is to investigate "sales" at less than fair value. The agency's assertion that the enrichers' transactions with the utilities are the only transactions that could be such sales, without more, does not establish that there is an evidentiary or legal basis to conclude that those transactions constitute sales for purposes of our antidumping statutes.

USEC Inc. v. United States, 281 F. Supp. 2d 1334, 1340 (Ct. Int'l Trade 2003) ("*USEC II*"), Gov't App. 45a-46a. The parties thereafter obtained an order from the CIT permitting an interlocutory appeal, pursuant to 28 U.S.C. § 1292(d)(1) (2000), on the issues relating to Commerce's treatment of contracts for toll manufacturing services as contracts for the sale of merchandise.

The Federal Circuit affirmed the CIT's conclusion that enrichment services transactions are not sales of goods. *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005), Gov't App. 8a-28a. It agreed that the enrichment contracts "do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU." *Id.* at 1362, Gov't App. 20a. The court held that enrichment transactions were not "sales" of merchandise under the antidumping law, because "the 'transfer of

ownership' required for a sale under [*NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997)] is not present here." *Id.* The court also observed that in a recent case arising under the Contracts Disputes Act, *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002), it had agreed with the Government's own argument that similar uranium enrichment contracts were sales of services. The court found that reasoning in *Florida Power* persuasive, although it noted that "*Florida Power* is not binding precedent for this case." *Eurodif I*, 411 F.3d at 1363, Gov't App. 21a.[16]

The Government and USEC sought rehearing and rehearing *en banc*, noting in supplemental filings this Court's recently issued decision in *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967 (2005). In *Brand X*, this Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the

[16] In the litigation underlying *Eurodif I*, the Government itself had cited *Florida Power* to the Federal Circuit as legal support for its position, noting that in that case the court had stated that its decision on the nature of the enrichment contracts was "difficult." Gov't Pet. at 15. In fact, the contracts in *Florida Power*, unlike the contracts at issue here, provided for the transfer of title over the uranium feedstock from the utility to the Government during the enrichment process. *Fla. Power*, 307 F.3d at 1373. Nevertheless, the court in *Florida Power* found no sale of a good had occurred because there was no sales price for the LEU, only for the enrichment services. *Id.* In the enrichment services contracts at issue in this case, no such title transfer for the uranium feedstock occurs, making their nature as services transactions even clearer than in *Florida Power*.

unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982.

The Federal Circuit denied rehearing *en banc*, and granted rehearing for the limited purpose of addressing the application of *Brand X*. In its rehearing decision, the court emphasized that it had not relied on *Florida Power* as binding precedent, and explained "the antidumping duty statute unambiguously applies to the sale of goods and not services." *Eurodif S.A. v. United States*, 423 F.3d 1275, 1277-78 (Fed. Cir. 2005) ("*Eurodif II*"), Gov't App. 33a. The court further affirmed its conclusion that "Commerce's characterization of the SWU contracts at issue in this case would contradict . . . the statute's unambiguous meaning because it is clear that those contracts are contracts for services and not goods." *Id.*[17]

On remand, Commerce removed the enrichment transactions from its calculations, but initially resisted excluding LEU imported pursuant to enrichment services transactions from the antidumping order. *Final Results of Low Enriched Uranium from France Remand Redetermination* (Dep't of Commerce Mar. 3, 2006), USEC App. 320a, 322a-26a. On appeal, the CIT held that because LEU imported pursuant to enrichment services contracts is never sold as merchandise, Commerce was required to exclude such

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[17] USEC claims that the court based its decision on the title retention provisions in enrichment services contracts. USEC Brief at 48-49. In fact, the decisions in *Eurodif I* and *II* were based on the contracts as a whole, including their provisions on title and payment. *See Eurodif I*, 411 F.3d at 1362-64, Gov't App. 17a-24a.

imports from the scope of the antidumping order. *Eurodif S.A. v. United States*, 431 F. Supp. 2d 1351, 1354-57 (Ct. Int'l Trade 2006), USEC App. 327a, 333a-38a. In the subsequent remand determination, Commerce modified the scope of the antidumping order accordingly, and issued a form by which Eurodif and the utilities could certify that specific LEU imports met the conditions for exclusion. *Final Results of Low Enriched Uranium from France Remand Redetermination* (June 19, 2006), USEC App. 341a.

After the CIT affirmed the remand results, the Government and USEC appealed the limited question of whether Commerce should be required to exclude imports under enrichment contracts at the time of import or only after Commerce conducted further factual analysis. The appellate court dismissed the appeal as unripe. *Eurodif S.A. v. United States*, 506 F.3d 1051 (Fed. Cir. 2007), Gov't App. 1a-7a. The Petitioners then sought review of the 2005 *Eurodif* decisions by this Court.[18]

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[18] At USEC's request, Commerce initiated a countervailing duty ("CVD") investigation involving Eurodif simultaneously with the antidumping investigation. (CVD investigations are directed at offsetting foreign government subsidies for imported goods). Under 19 U.S.C. § 1677(5)(D)(iv), the purchase of "goods" by a government for more than adequate remuneration is treated as a countervailable subsidy. Commerce found that the French government's purchase of enrichment services from Eurodif was a subsidy, but the Federal Circuit rejected Commerce's determination on the basis that the purchases were of services, not goods, and that Section 1677(5)(D)(iv) expressly only applied to purchases of goods. Neither the Government nor USEC sought further review of that determination.

SUMMARY OF ARGUMENT

The antidumping statute, 19 U.S.C. § 1673, requires that "merchandise . . . [be] sold" at less than fair value before Commerce may find that dumping of that merchandise has occurred. *Id.* The Federal Circuit correctly applied *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in holding that the term "merchandise . . . sold" is unambiguous and does not cover sales of uranium enrichment services. Commerce's decision to apply the antidumping law to transactions in manufacturing services was inconsistent with the plain language of the statute.

Petitioners argue that the meaning of "merchandise . . . sold" is ambiguous, and that Commerce is therefore entitled to deference in interpreting that term. Even before this case, however, the Federal Circuit was presented with this same question, and it concluded that Congress intended to give the word "sold" its ordinary meaning. *See NSK*, 115 F.3d at 974. Under this Court's 2005 decision in *Brand X*, *stare decisis* bound Commerce to the *NSK* interpretation because that precedent found the relevant statutory language to be unambiguous. The Federal Circuit followed *NSK* in this case by determining that the contracts were not for sales of goods and therefore the transactions could not involve dumping.

The Federal Circuit's holdings in *NSK* and in this case are strongly supported by the statute itself and Commerce's prior practice in other cases involving manufacturing services. As this Court has held, words

in statutes must be given their accumulated, settled meaning absent evidence for a specific meaning in the statute. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). Dictionaries universally define "sale" as requiring a transfer of ownership for consideration. Thus, there can be no dumping unless ownership over the imported goods is transferred in return for a price.

Significantly, Congress has enacted other laws that allow for added duties or quota restrictions to be placed on imports without requiring sales of merchandise. *See, e.g.*, 19 U.S.C. §§ 2251 *et seq.* (allowing U.S. manufacturers to request temporary "safeguard" measures if they are being injured by foreign imports, without the need to show that imports are being sold at less than fair value or subsidized). Such laws demonstrate that Congress is fully capable of creating broad trade remedies when it so wishes.

Consistent with the unambiguous language of the statute, Commerce's past practice in cases involving all other industries has been not to treat manufacturing services transactions as "relevant sales" under the antidumping law, concluding that the antidumping statute requires a sale of merchandise at a price reflecting all elements of the merchandise's value. *See TSMC Remand Redetermination* at 4-6 (text between nn.4-12). Indeed, Commerce issued the "tolling regulation" to codify its practice with respect to such manufacturing services. Both the tolling regulation and Commerce's decisions issued on the basis of that regulation directly conflict with the specific arguments

raised by the Government and USEC in this case, including the arguments that substantial transformation and fungibility are pertinent in deciding whether a transaction is a relevant sale. Rather, Commerce has always previously concluded that where the customer continues to own an essential element of the finished product throughout the production process, no relevant sale of merchandise has occurred. *Id.* at 3-5 (text between nn.4-12).

Under enrichment services contracts, there is no payment – and thus no price – for the LEU itself, only for the enrichment services deemed to have been used in producing it. *See, e.g.*, C.J.A. 26-27. The enricher does not recognize the uranium as an asset on its books, or pay property or sales taxes on it. *See, e.g.*, USEC Property Tax Letter, J.A. 128. The enricher does not have any exposure to value fluctuations in its customers' uranium, and generally does not even know the actual value of that uranium. The delivery of uranium by the utilities to the enricher cannot be treated as a "payment in kind," as the Government suggests, when neither the utilities nor the enrichers treat it as an exchange of ownership.

Petitioners' argument that enrichment services transactions are "functionally equivalent" to sales of EUP is contradicted by the many significant differences between the two types of contracts. Indeed, every public statement by enrichers – including USEC prior to this case – accurately characterized enrichment transactions as sales of services.

USEC and the Government also argue that enrichment services contracts could be treated as sales of LEU because uranium is fungible and therefore utilities do not receive back the same uranium atoms they provided to the enricher. Under the contracts that define the transaction, however, the utility is legally deemed to receive back the same uranium it provided. C.J.A. 17, 87, 140, 188, 268. Moreover, Commerce's proposal to base its characterization of the transaction on physical tracing of uranium atoms ignores the entire accounting-based system on which the fuel cycle industry, and government regulation of that industry, are grounded.

Complaints by USEC and the Government that the *Eurodif* decisions create a "loophole" for other industries has no merit, because imported merchandise is always subject to the antidumping law if it is sold in the United States, including in circumstances where it has been incorporated into another product before that sale. U.S. companies in the steel products and semiconductor industries have long contracted for toll production services in foreign countries, and the resulting products have been routinely subject to the antidumping law when they are sold by the U.S. company after importation. The circumstances of this industry are unique, in that the utilities consume the end product and do not sell it.

The Government and USEC also argue that the Court's decision should be influenced by purported national security and foreign policy objectives that are wholly external to the antidumping statute, such as encouraging Russia to maintain the Highly Enriched

Uranium ("HEU") Agreement and supporting a private company, USEC, so that in the future it could produce enriched uranium for tritium production or military use if needed.[19] Their policy arguments are irrelevant to the legal issues raised at bar and are appropriately left to Congress. In any event, (i) the United States has a stockpile of HEU sufficient to cover U.S. defense and nuclear propulsion needs for the next 50 years, and (ii) the United States owns the enrichment facilities leased by USEC and can reclaim them if necessary. Finally, there is no evidence Russia intends to abandon the HEU Agreement if it were allowed to sell commercial enrichment services directly to U.S. utilities. To the contrary, Russia has commercial incentives to gain access to the uranium feedstock underlying blended-down HEU. Further, there is limited available demand for enrichment services not already under contract in the United States prior to expiration of the HEU Agreement in 2013.

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[19] The "HEU Agreement" is the Agreement Between The Government Of The United States Of America And The Government Of The Russian Federation Concerning The Disposition Of Highly Enriched Uranium Extracted From Nuclear Weapons, U.S.-Russia, Feb. 18, 1993, *available at* http://www.ne.doe.gov/nuclearFuelSecurity/neNFSRelatedDocuments.html.

ARGUMENT

I. The Antidumping Law Unambiguously Requires A Sale Of Subject Merchandise, Which Does Not Occur In Enrichment Services Transactions

Under the test enunciated by this Court in *Chevron*, a court reviewing an administrative determination based on interpretation of an agency's governing statute must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. The antidumping statute authorizes Commerce to impose antidumping duties on "foreign merchandise [that] is being, or is likely to be, sold in the United States at less than its fair value . . . ." 19 U.S.C. § 1673(1). "Dumping" is defined as the "sale of goods at less than fair value." 19 U.S.C. § 1677(34). The Federal Circuit correctly applied *Chevron* to hold – or, more accurately, to reconfirm – that the term "merchandise . . . sold" is unambiguous and does not cover sales of manufacturing services such as uranium enrichment. Commerce's attempt to stretch the law to cover such a service transaction is facially inconsistent not only with the plain meaning of the statute under which it was rendered, but also with Commerce's own regulations and uniform past practice.

A. Commerce Was Bound By The Federal Circuit's Prior Determination That The Antidumping Law Unambiguously Requires That Merchandise Be Sold

The Petitioners argue that the term "merchandise . . . sold" is not defined in the antidumping statute, and is therefore an ambiguous phrase that Commerce should be allowed to define as it sees fit. Gov't Brief at 23-24; USEC Brief at 27-29. On the contrary, the absence of any unique statutory definition or usage demonstrates that the relevant phrase should be given its ordinary, dictionary meaning, as Commerce and the courts have uniformly interpreted it prior to this proceeding.

Indeed, the question whether the term "merchandise . . . sold" is unambiguous was not one of first impression in the Federal Circuit. That court previously considered and settled that question in *NSK*, 115 F.3d 965. In *NSK*, Commerce had determined that transactions involving free samples could be deemed "merchandise . . . sold" within the meaning of Section 1673. The government argued to the Federal Circuit, as it does here, that not deferring to Commerce's interpretation would create a loophole in the antidumping law. *Id.* at 972. As part of a detailed analysis that included consideration of dictionary definitions, the Federal Circuit held that "Congress intended to give the term ["sold"] its ordinary meaning . . . ." *Id.* at 974. It also stated that "contrary to the Government's suggestion, we do not believe that the term 'sale' should be given any special meaning under the antidumping laws." *Id.* The Federal Circuit concluded:

> [t]he terms of the statutory provisions are clear on their faces and we see no reason to

> depart from the ordinary meaning of the term 'sold' or 'sale'. We thus need not reach the second prong of the *Chevron* analysis.

Id. at 975. *NSK* rejected Commerce's theory that the actual terms of the transaction can be ignored in determining whether the transaction meets the statutory requirement for a sale. If there is no transfer of legal ownership for consideration, there is no sale.

In the instant case, the Federal Circuit expressly relied on *NSK*:

> [T]he SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the "transfer of ownership" required for a sale under *NSK* is not present here.

Eurodif I, 411 F. 3d at 1362, Gov't App. 20a. Under the Court's 2005 decision in *Brand X*, *stare decisis* bound Commerce to the *NSK* interpretation because that precedent found the relevant statutory language to be unambiguous. *Brand X*, 545 U.S. at 982. Specifically, consistent with the standard established by the Court in *Brand X*, *NSK* confirmed that the antidumping statute does not "admit of two or more reasonable ordinary usages," *Brand X*, 545 U.S. at 989, and thus there was no gap for Commerce to fill under *Chevron*.

B. The Plain Meaning Of "Foreign Merchandise . . . Sold" Requires That Ownership Of The Merchandise Be Transferred In Return For Consideration

The holdings of the Federal Circuit in *NSK* and in the case at bar are supported by the available evidence regarding the meaning of the term "merchandise . . . sold," including the accumulated, settled meaning of the word "sale." *See NLRB*, 453 U.S. at 329 (stating words in statutes must be given their accumulated, settled meaning absent evidence for a specific meaning in the statute). That accumulated, settled meaning is provided by dictionaries, which universally define "sale" as requiring a transfer of ownership for consideration. *See, e.g., Black's Law Dictionary* 1337 (6th ed. 1990) (defining "sale" as a "contract . . . by which the [seller], in consideration of the payment or promise of payment of a certain price in money, transfers to the [buyer] the title and the possession of property"); *Webster's Third New International Dictionary* 2003 (1986) (defining "sale" as "a contract transferring the absolute or general ownership of property from one person . . . to another for a price"). These definitions consistently require a transfer of ownership in return for consideration. *See also NSK*, 115 F.3d at 974 n.12 (holding that because giving away a free sample is not a sale due to the lack of consideration, it cannot be dumping under the statute). There can be no dumping unless ownership over the imported goods is transferred in return for a price.

USEC and the Government ignore *NSK* and, despite the Government paying lip service to the dictionary definition of the term "sale" (Gov't Brief at 27-28), they

ignore that meaning as well. They argue, for example, that a 1984 amendment to the antidumping law adding coverage for "leasing arrangement[s] . . . that [are] equivalent to the sale of the merchandise" indicates that "foreign merchandise . . . sold" should be interpreted to encompass enrichment services contracts. USEC Brief at 33; Gov't Brief at 30. The fact that Congress specifically extended the definition of "sale" to certain lease transactions equivalent to sales provides no basis to conclude that the definition of "sale" was extended to other areas as well.[20] Indeed, if the law had been extended to cover toll manufacturing services as USEC and the Government now suggest, then Commerce's tolling regulation would have been both unnecessary and unlawful, because it required treating toll services as sales of services rather than sales of merchandise.

Petitioners similarly assert the term "merchandise . . . sold" should be given a broader meaning because courts have occasionally held that specific leases and options contracts qualify as "sales" under other unrelated statutes. *See* USEC Brief at 30-31; Gov't Brief at 29. The cited cases are not relevant to defining "merchandise . . . sold" in the antidumping law for two reasons.

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[20] Congress amended the law to cover leases that qualify as transfers of ownership. Congress noted the lease provision was intended to capture "sham leases or leases which are tantamount to sales. Because of tax considerations or other business reasons, leasing arrangements are often utilized to accomplish what are in effect transfers of ownership." H.R. Rep. 98-725, at 11 (1st Sess. 1984), *as reprinted in* 1984 U.S.C.C.A.N. 5138. Thus, even in lease transactions there must be a transfer of ownership before Commerce may impose antidumping duties.

First, the cited cases were intended to prevent parties from avoiding a statutory scheme by structuring their sales transactions as leases and options contracts rather than outright sales. *See SEC v. National Securities, Inc.*, 393 U.S. 453 (1969) (finding takeover bidder used fraudulent and misleading statements to shareholders in takeover bid, contrary to Securities Act's prohibition on securities fraud); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392 (1965) (finding natural gas pipeline company converted purchases of natural gas to lease of gas production rights, thereby avoiding federal price controls on natural gas); *Gray v. Powell*, 314 U.S. 402 (1941) (finding coal purchaser leased established coalfield output rather than purchase coal to avoid federal price controls on coal). No party has argued that enrichment services transactions were designed to circumvent the antidumping law, so expansion of the plain definition of "sale" is not warranted.

Second, in each of the cited cases there was a transfer of some ownership rights in return for consideration. In *National Securities*, a corporate takeover was achieved through purchase of shares and shareholder merger approval. In *United Gas* and *Gray*, the buyers purchased leases to production from an established field at a fixed price. In enrichment services contracts, by contrast, no lease or other transfer of ownership rights takes place.

The Government also claims Commerce can treat enrichment services transactions as sales of LEU because utilities separately purchase both the uranium feed and enrichment services. Gov't Brief at 27-32.

However, the statute requires that the *subject merchandise* be sold for less than fair value, and defines "subject merchandise" as "the class or kind of merchandise that is within the scope of an investigation . . . ." 19 U.S.C. § 1677(25). That definition leaves no gap for Commerce to fill by treating separate sales of raw materials and processing services as sales of subject merchandise. If Commerce were able to treat separate sales of inputs and services as sales of subject merchandise, the whole concept of dumping would become meaningless: there would be no price setter establishing the export price for the subject merchandise, no sales price of that merchandise to compare against home market value, and thus no basis for a dumping determination.[21]

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[21] The Government argues that Sections 1677a and 1677b(e)(1) support its claim that a dumping determination can be based on a "price" fabricated from separate sales of components and processing services. Gov't Brief at 33, 42. This is facially incorrect. Section 1677a simply allows Commerce to adjust the sales price as necessary to enable an "apples-to-apples" comparison between home market value and export price, by removing shipping costs and value added after import, for example. Whether based on export price or constructed export price, the price for subject merchandise must be based on a sale of the merchandise itself, not on sales of input values for that merchandise. *See* Comm. on Ways and Means, 109th Cong., *Overview and Compilation of U.S. Trade Statutes*, Pt. I, at 106 (2005) ("*Overview of US Trade Law*"), *available at* http://waysandmeans.house.gov/Documents.asp?section=9 ("'Constructed export price' is the price at which merchandise is sold or agreed to be sold in the United States before or after importation, by or for the account of the producer or exporter to the first unrelated purchaser. Typically, it is used if the

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Crucially, when Congress intended to provide import remedies not requiring a sale of the imported merchandise, it said so explicitly. *See, e.g.*, 19 U.S.C. §§ 2251 *et seq.* (allowing U.S. manufacturers to request temporary "safeguard" measures such as additional duties or quota restrictions if they are being injured by foreign imports). As Congress stated in amending the antidumping law in 1979:

> [The antidumping] statute is not intended to "protect or remedy" an injury from imports as contemplated under [the "safeguards" statute], nor is it just one of several remedies from which the Administration may choose to remedy import injury to a domestic industry. Rather, it is a remedy targeted at a specific type of injury caused by unfair import competition, and the Committee expects it to be administered in that context.[22]

USEC did not seek protection under the safeguards provision of 19 U.S.C. § 2251; it petitioned Commerce under the antidumping law. USEC Petition, J.A. 39. That

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purchaser and exporter are related."). By contrast, Section 1677b allows Commerce to base *normal value* – *i.e.*, the home country market value above which goods must be sold to avoid dumping – on the cost of producing the goods when an accurate home market price is not available. 19 U.S.C. § 1677b(a)(5). Neither Section 1677a nor Section 1677b allows Commerce to invent a sale of merchandise in the United States based on component values.

[22] H.R. Rep. No. 96-317 at 46 (1st Sess. 1979). *See generally Overview and Compilation of U.S. Trade Statutes*, *supra* n.21.

law, on its face, applies only when subject merchandise as a whole is sold for less than fair value.

Petitioners have previously acknowledged that the antidumping statute unambiguously applies only to foreign merchandise actually sold or likely to be sold in the United States. *See* USEC Certiorari Petition Brief at 21 ("No one contests that the statute applies to the sale of goods and not services."); Gov't Certiorari Petition Reply Brief at 4 ("The statute applies when there is a 'sale' of 'foreign merchandise.'"). Yet their briefs on the merits, like Commerce's determination at issue in this case, make a number of arguments that ignore the requirement for a sale of subject merchandise. *See, e.g.*, Gov't Brief at 8, 33 (arguing that Commerce may impose antidumping duties whenever a "major manufacturing operation . . . results in subject merchandise being introduced into the commerce of the United States"), *quoting Remand Redetermination*, Gov't App. 231a, 239a-40a; USEC Brief at 23, 39-41 (arguing that Commerce may impose antidumping duties on enrichment services because such services result in the substantial transformation of uranium feedstock into LEU). These arguments are unavailing. The statute unambiguously requires that foreign merchandise be sold before Commerce may find it to have been dumped and impose antidumping duties.

The Government incorrectly argues that Commerce may base dumping determinations on toll manufacturing transactions because the statute refers to both sales and "likely sales" of subject merchandise. Gov't Brief at 30. The statute's reference to "likely sales" allows Commerce to calculate dumping margins based on

imminent sales of subject merchandise that contain specific price terms. *See* 19 U.S.C. § 1677a; *see also* H.R. Rep. No. 98-725 at 11, *as reprinted in* 1984 U.S.C.C.A.N 5137 (explaining that the inclusion of "likely sales" "is intended to eliminate uncertainties about the authority of the Department of Commerce . . . in situations where actual importation has not yet occurred but a sale for importation has been completed or is imminent."); S. Rep. No. 66-510 at 1 (2d Sess. 1920) (noting that the "purchase price" for imported merchandise was "the price or amount paid or to be paid for purchased merchandise as packed ready for shipment . . ."); *see also Kerr-McGee Chemical Corp. v. United States*, 765 F. Supp. 1576, 1580 (Ct. Int'l Trade 1991) ("The court does accept, as a reasonable application of the statute, [Commerce's] insistence on evidence of the seller's intention to sell at a specific price."). Those likely sales must by definition specify a price for the subject merchandise as a whole, not just the price for toll manufacturing.

C. Commerce's Tolling Regulation And Uniform Practice Confirm That Sales Of Manufacturing Services Are Not Sales Of Subject Merchandise

Prior to this case, Commerce had a long-established practice of not treating transactions in toll manufacturing services as sales of merchandise, on the basis that the price paid for such services does not reflect the value of the merchandise as a whole. In fact, Commerce issued the tolling regulation to codify its practice on the treatment of manufacturing services. The agency only recently revoked the tolling regulation in an effort to avoid the result in this particular case.

The tolling regulation, 19 C.F.R. § 351.401(h), required that Commerce's dumping analysis be based on a "relevant sale" of subject merchandise. Commerce has clarified that the relevant sale under the tolling regulation is the "first sale in the distribution chain by the company that is in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market." *TSMC Remand Redetermination* at 4 (text between nn.4-5). As Commerce further explained:

> [T]he price paid [in a toll service transaction] may not represent the entire value of the subject merchandise, but merely represents a portion of that value. In fact, in most subcontracting arrangements, the contractor *already owns an essential portion of the product*, and thus the price paid is only for the work performed by the subcontractor; that is, the sale by the subcontractor is only a sale of the service it performed (and any inputs provided). Under these circumstances, . . . *we do not consider the 'sale' between the subcontractor and such a contractor to be a sale of subject merchandise at all.*

Id. at 4 (text between nn.8-9) (Emphasis in original).

Commerce's statement in the *TSMC Remand Redetermination* above leaves no doubt that sales of toll manufacturing services are not sales of subject merchandise. Commerce's recognition in the tolling regulation that sales of toll services are not sales of subject merchandise flows directly from the antidumping law's requirement that subject merchandise be sold before Commerce may determine

an export price for the merchandise or impose antidumping duties on its importation. *See* 19 U.S.C. § 1677a; *TSMC Remand Redetermination* at 3-4 (text between nn.3-4) (explaining that its tolling practice is consistent with 19 U.S.C. §§ 1677(a) and (b)).

Nevertheless, USEC and the Government claim that enrichment services contracts may be considered sales of LEU based on the very arguments rejected by Commerce in its prior tolling cases. In particular, they rely heavily on Commerce's conclusions that LEU is a major manufacturing operation which substantially transforms fungible uranium into a new and different article. They assert that although LEU is not sold in a single transaction representing the full value of the merchandise, Commerce can nonetheless combine separate transactions for uranium and enrichment services to create the sale of LEU because the transaction resulted in the delivery of LEU in the United States. Gov't Brief at 25-34; USEC Brief at 38-42. As determined by the court below, however, these factors have not been determinative of whether merchandise is sold under the statute. *See USEC II*, 281 F. Supp. 2d at 1343, Gov't App. 52a ("[W]e find Commerce's continuing attempts to distinguish its earlier tolling cases from the instant case unpersuasive.").[23]

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[23] The Government asserts that the tolling regulation is applicable only to the calculation of dumping margins, not to the applicability of the antidumping law. Gov't Brief at 7. Yet these are two sides of the same coin. The statutory requirement that dumping determinations be based on sales of the subject merchandise cannot be met unless there is a relevant sale of the subject merchandise as a whole. If a particular transaction does not include all elements of the subject merchandise's value, then

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Specifically, Commerce has never treated tolling transactions as relevant sales based on whether the tolling results in substantial transformation of inputs provided by the owner into a new and different article. *See, e.g., Collated Roofing Nails From Taiwan*, 62 Fed. Reg. 51,427, 51,435 (Dep't of Commerce Oct. 1, 1997) (toll service provider transformed wire rod owned by another into collated roofing nails); *Stainless Steel Wire Rod From Sweden*, 63 Fed. Reg. 40,449, 40,453-54 (Dep't of Commerce July 29, 1998) (toll service provider transformed steel billets owned by another into stainless steel wire rod); *Certain Forged Stainless Steel Flanges From India*, 58 Fed. Reg. 68,853, 68,855-56 (Dep't of Commerce Dec. 29, 1993) (toll service provider transformed steel into customized flanges).[24]

Likewise, Commerce has not treated toll services transactions as relevant sales based on whether they involve fungible inputs. For example, in *Polyvinyl Alcohol From Taiwan*, 63 Fed. Reg. 32,810 (Dep't of

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it cannot be a sale of that merchandise and cannot provide a basis for Commerce's dumping determination. 19 C.F.R. § 351.401(h). Where there is no dumping, Commerce may not impose antidumping duties. 19 U.S.C. § 1673. For example, the law excludes from dumping duties temporary imports that will be reexported without being sold in the United States. *See, e.g., Final Determination*, Gov't App. 223a-24a.

[24] In the *TSMC Remand Redetermination* Commerce found a toll services transaction not to be a sale of subject merchandise even though the U.S. company only provided a semiconductor design and the foreign manufacturer provided the inputs and performed all the manufacturing of the semiconductors. *TSMC Remand Redetermination* at 3-5 (text between nn.3-12).

Commerce June 16, 1998) ("*PVA*"), the foreign toll producer received fungible inputs from third parties such as DuPont and used those inputs, along with similar inputs of its own, to produce PVA, a fungible chemical product. Despite the fungible nature of both the inputs and the finished product, Commerce found the toll service transaction to be a sale of services rather than a relevant sale because the service transaction did not include all elements of the subject merchandise's value. *Id.* at 32,811, 32,817; *see also Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. 68,853, 68,856 (Dep't of Commerce Dec. 29, 1993) (explaining that "all of the flanges are essentially fungible").

Commerce has consistently concluded that where the customer continues to own an essential element of the finished product throughout the production process, no relevant sale has occurred.[25] *See, e.g., Collated Roofing Nails from Taiwan*, 62 Fed. Reg. at 51,435 (finding no sale because respondent "pays a processing fee and maintains title over the raw materials and completed collated roofing nails throughout the production process"); *Stainless Steel Bar from India*, 65 Fed. Reg. 59,173, 59,174 (Dep't of Commerce Oct. 4, 2000) (finding no sale because respondent purchased inputs, paid a processing fee and maintained title to the inputs and final product); *Stainless Steel Wire Rod from*

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[25] Commerce made clear when adopting the tolling regulation that tolling transactions generally do not include a transfer of ownership over the goods being processed. *See Antidumping Duties; Countervailing Duties: Notice of proposed rulemaking and request for Public Comments*, 61 Fed. Reg. 7,308, 7,330 (Dep't of Commerce Feb. 27, 1996) (explaining that the party contracting for toll manufacturing services generally owns the goods being manufactured).

Sweden, 63 Fed. Reg. at 40,453-54 (finding no sale because respondent "retains title to the billets at all times and simply pays [the toll services provider] a processing fee"); *Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. at 68,855-56 (finding no sale because respondent "purchases and maintains title (during the entire course of production) to the raw materials used"). In each case Commerce held that a sale for determining dumping must be a sale of the goods as a whole, not just the sale of the service for toll manufacturing those goods.

The single genuine distinction between this case and other tolling cases is not the transaction itself, but what happens after importation. In prior tolling cases involving other industries, the subject merchandise has been sold in a subsequent transaction, and Commerce based its dumping determination on that later sale.[26] *See, e.g., PVA*, 63 Fed. Reg. at 32,812. In contrast, LEU imported under enrichment services contracts is consumed by the utilities themselves and not subsequently sold. Indeed, Commerce claims in its *Remand Redetermination* that it had to treat enrichment services transactions as relevant sales of subject merchandise for the very reason that there was no subsequent sale of the LEU. *Remand Redetermination*, Gov't App. 121a-26a; Gov't Brief at 13. This is nothing more than results-driven decision-making by the agency.

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[26] Thus, in some cases U.S. companies have been designated as the "foreign producer" because they were the first parties to sell the merchandise in the United States at a price reflecting all elements of the product's value. *See, e.g., TSMC Remand Redetermination* at 6 n.4; *PVA*, 63 Fed. Reg. at 32,819.

Commerce acknowledged in the *TSMC Remand Redetermination* that its definition of "relevant sale" was required by the statute:

> The practice of determining producer status based upon who is in control of the production and relevant sale is consistent with sections 772(a) and (b) of the Tariff Act of 1930, as amended, which define "export price" and "constructed export price" as the price at which the *subject merchandise is first sold (or agreed to be sold)* by the producer or exporter of such merchandise to an unaffiliated purchaser in, or for exportation to, the United States. Because a subcontractor does not sell "subject merchandise," but rather only sells services and/or inputs, the export price (or constructed export price) cannot be derived from the subcontractor's "sales."

TSMC Remand Redetermination at 3 (text between nn.3-4) (emphasis in original). Therefore, Commerce's revocation of the tolling regulation is not in accordance with the statute.

If a given transaction is a relevant sale, it must be used by Commerce to determine dumping. If it is not a relevant sale, it cannot be used to determine dumping. That principle remains applicable whether or not any other transaction in the distribution chain qualifies as a relevant sale. *USEC II*, 281 F. Supp. 2d at 1340, Gov't App. 43a-46a. The antidumping statute does not authorize Commerce to invent a relevant sale when no such sale occurred just to reach a desired end result.

That Commerce did so in this case leaves its determination unsupported by substantial evidence and not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).[27]

D. The *Eurodif* Decisions Properly Recognize That Enrichment Services Transactions Are Not Sales Of LEU Because There Is No Transfer Of Ownership In Return For Consideration

Because enrichment services contracts do not transfer ownership over the uranium being enriched and do not provide a price for the resulting LEU, every court that has reviewed those contracts, including the court below, has concluded that they are for services contracts, regardless of the legal context in which those contracts were analyzed.[28]

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[27] As the Court has stated, "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988)). Even if Commerce were due deference under the second prong of *Chevron*, however, Commerce's determination would fail because the agency's interpretation, which contradicted its long-standing and uniformly-applied position codified in its tolling regulation, did not reflect a "reasonable policy choice." *Chevron*, 467 U.S. at 843.

[28] *See, e.g., Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 664 (1988) ("In § 161(v) [of the Atomic Energy Act of 1954], Congress accounted for this *de facto* monopoly by authorizing

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The Government nonetheless argues that even if contract manufacturing transactions are not sales of merchandise under the antidumping statute, it was permissible for Commerce to construe the enrichment contracts as actual sales of merchandise. Gov't Brief at 44. This approach would allow Commerce to evade the requirements of the statute simply by mischaracterizing the contracts' terms and labeling the service contracts as sales of merchandise.

Critically, in enrichment services transactions the utility owns the uranium delivered to the enricher for enrichment. *See, e.g.*, C.J.A. 17, 140; USEC Property Tax Letter, J.A. 128. In enrichment services transactions the enricher does not receive title to the uranium. C.J.A. 17, 87, 140, 188, 267; J.A. 58 ("Generally, title to uranium provided by customers for enrichment purposes does not pass to USEC."). Obviously the enricher cannot convey title to uranium it does not own. *Eurodif I*, 411

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the Atomic Energy Commission to offer 'toll enrichment' services whereby utilities could obtain unenriched uranium on the open market and have it enriched by the AEC for a fee."); *Florida Power*, 307 F.3d 1364 (applying the Contract Disputes Act); *Centerior Serv. Co. v. United States*, No. 95-103C, 1997 U.S. Claims LEXIS 323, at *19 (Dec. 29, 1997) (applying the Uniform Commercial Code); *Barseback Kraft AB v. United States*, 36 Fed. Cl. 691, 705 (1996) (applying the Uniform Commercial Code); *see also DOE Uranium Enrichment Program*, 51 Fed. Reg. 11,811, 11,812 (Dep't of Energy Apr. 7, 1986) (describing enrichment as "an arrangement whereby uranium supplied by a customer is enriched in uranium-235 content by DOE and then returned to that customer" and stating that such "[s]ervices are provided under contracts which are generally signed with publicly or privately owned utilities").

F.3d at 1362, Gov't App. 20a ("[T]he SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the 'transfer of ownership' required for a sale under *NSK* is not present here."). It follows that utilities receive back their own uranium after it has been enriched.[29] USEC and the Government deride this fact as a "legal fiction." USEC Brief at 49, 54; Gov't Brief at 45-46. However, this "legal fiction" is a contractual and economic reality that defines both the transaction as a whole and the legal rights that flow from it, and is critical to regulation of the entire nuclear fuel cycle.

Under enrichment contracts, there is no payment – and thus no price – for the LEU itself, only for the enrichment services deemed to have been used in producing it. USEC and the Government attempt to characterize the provision of uranium feedstock for enrichment as a payment in kind by the utilities in return for some portion of the LEU delivered by the enricher at the end of the enrichment process. USEC Brief at 4; Gov't Brief at 48. This assertion is not supported by the facts, however. As noted above, title to the uranium feedstock is never transferred from the utility to the enricher. The enricher does not recognize the uranium as an asset on its books, or pay property or sales taxes on it. *USEC Annual Report* (2000), J.A. 58. Indeed, the enricher does not have any exposure to value fluctuations in its customers' uranium, and generally

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[29] Consistent with that concept, the utilities receive back uranium with the same origin as the uranium feed they provided. *See, e.g.*, C.J.A. 87-88, 140, 268.

does not even know the actual value of that uranium. J.A. 58; AHUG Letter to Commerce (Apr. 5, 2001), J.A. 179. The provision of uranium feedstock for enrichment cannot be a payment in kind when neither the utility nor the enricher treats it as an exchange of ownership over the uranium being enriched.[30]

Commerce's method for determining dumping in its investigation confirms that there is no sale of LEU in enrichment services transactions. As the Government concedes, in determining whether French LEU was being dumped in the United States, Commerce had no value for the uranium itself, because that value was not part of the enrichment services transactions under which the LEU was produced. Gov't Brief at 11. Accordingly, to account for information that did not exist, Commerce estimated a value for the uranium feedstock, and then included that same value in both its estimate of how much LEU was sold for in the United States and how much it was sold for in France. As Commerce acknowledged in its *Remand Redetermination*:

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[30] USEC and the Government claim that, regardless of who owns the uranium feedstock, the enricher owns the LEU until delivery, so title must transfer from them to the utility. USEC Brief at 49-50; Gov't Brief at 50. The assertion that enrichers own LEU even though they do not own the uranium from which it was created is baseless. The legal concept of ownership is defined in enrichment transactions by the contracts that effectuate the transaction. Under those contracts, the utility owns its uranium feedstock until that feedstock is deemed to have been enriched, at which point the utility's title to the feedstock *becomes* title to the LEU derived from it. C.J.A. 17, 87, 140, 188, 267-68. Transformation of the uranium from one form into another does not affect the uranium's ownership, which remains at all times with the utility.

> In assigning a specific monetary value to the natural uranium component, we *estimated* the market value using the average price the enrichers charged their customers for natural uranium for LEU contracts. For SWU contracts, when comparing U.S. Price with Normal Value based on constructed value, we valued natural uranium using exactly the same value for both sides of the equation. For example, for any given shipment pursuant to a SWU contract we determined the quantity (*i.e.* kgs) of associated feed uranium by applying the industry standard formula for product and tails assay specified in the contract. We valued this quantity using POI average per-kg price for natural uranium charged by enrichers. This exact same amount was included in normal value.

Remand Redetermination, Gov't App. 131a (quoting *Final Determination*, Gov't App. 257a) (emphasis added). By proceeding in this manner, Commerce included the same fictitious input value on both sides of its dumping equation, thereby eliminating the estimated uranium value from the dumping determination entirely. All that was left was the price for enrichment services, which Commerce, in effect, treated as the price for the LEU as a whole. That approach was unlawful because Commerce cannot determine whether goods are being dumped without a price for the goods themselves. 19 U.S.C. §§ 1677a(a), (b) (basing both "export price" and "constructed export price" on "the *price* at which the subject merchandise is first sold") (emphasis added).

USEC and the Government argue that enrichment services contracts must be sales of LEU because uranium is fungible, so utilities do not receive back at the end of the enrichment process the same uranium atoms provided at the beginning of the enrichment process. USEC Brief at 43-48; Gov't Brief at 45-50. The fungibility of uranium is irrelevant to the nature of the transaction, however. Under the contracts that define the transaction between the parties, the utility is legally deemed to receive back the same uranium provided at the start of enrichment. C.J.A. 17, 87, 140, 188, 268. That transaction is established by the contract between the parties, not by the enricher's commingling of uranium feedstock.

Indeed, the suggestion that Commerce can base its characterization of the transaction on physical tracing of uranium atoms makes no sense. Much of the nuclear fuel cycle – not just enrichment – is based on accounting for quantities rather than specific atoms. The contractual transfer generally takes place when quantities are transferred between accounts at the enricher to accounts at the fabricator, not when physical delivery takes place. C.J.A. 15, 85, 143, 187, 266. If carried to its logical conclusion, Petitioners' argument for atom tracing would preclude verification of whether LEU enriched by any particular enricher ultimately was delivered to the utilities, and the entire account-based system of tracking nuclear materials would collapse.

USEC and the Government point to cases on the law of bailment as a *post hoc* rationalization to support their claim that the advancement and commingling of fungible merchandise results in a sale of goods rather

than a service transaction. USEC Brief at 46-48; Gov't Brief at 48-49. The bailment cases are irrelevant, however. *NSK* and Commerce's tolling regulation have already provided a definition of "sale" in the dumping context, so there is no need to look to unrelated areas of law to define it. Regardless, the bailment opinions cited by USEC and the Government characterized transactions only when the contracts themselves were unclear on the issue. They did not override the expressed intent of the parties. *Powder Co. v. Burkhardt*, 97 U.S. 110, 119 (1877) (noting that the contract "contain[ed] no reservation of title in the goods"); *Sturm v. Boker*, 150 U.S. 312, 322 (1893) (recognizing that contract terms determine bailment); *see also* 8A Am. Jur. 2d *Bailments* § 29 (2008) (explaining that "an express agreement will prevail against general principles of law").

Finally, USEC and the Government claim that enrichment services transactions should be treated as sales of LEU because, according to them, such service transactions are "functionally equivalent" to sales of EUP. *See, e.g.*, USEC Brief at 35; Gov't Brief at 10, 25-26. But the argument that the *Eurodif* decisions elevate contract "form" over "substance" is baseless. As the lower courts properly found, there are fundamental differences in the substance of the transaction and the parties' rights and obligations between enrichment contracts and EUP sales. Of particular note:

- In enrichment contracts, the utility owns the uranium throughout the transaction. C.J.A. 17, 87, 140, 188, 267-68. In EUP sales the utility purchases a complete product from the enricher and gains title at that time. C.J.A. 333, 392.

- In enrichment contracts, the utility pays only for a quantity of enrichment services deemed provided by the enricher. C.J.A. 26-27, 97, 134, 199-200, 276-77. In EUP contracts, the utility pays a price for the LEU as a whole. C.J.A. 335-36, 393.

- In enrichment contracts, two utilities can purchase the same amount of SWU but receive vastly different quantities of LEU, depending on the amount of uranium they decide to enrich and how much U^{235} they want the enricher to "squeeze" out of the waste stream from that uranium. In EUP contracts the utility purchases a specific quantity of LEU denominated in kilograms of EUP. C.J.A. 332, 388.

- In enrichment contracts, the utility is responsible for providing uranium feedstock to be enriched. C.J.A. 13, 83, 140, 182-83, 268-69. In EUP contracts, the utility has no such responsibility. C.J.A. 332, 390 (no provision for delivery of uranium feedstock).

- In enrichment contracts, the utility bears the risk of price fluctuations in the uranium feedstock. In EUP contracts the enricher bears that risk.

- In enrichment transactions, the utility is ultimately responsible for all property taxes owed on the uranium being enriched. USEC Property Tax Letter, J.A. 128; C.J.A. 26-27, 97-98, 200-01. In EUP transactions the enricher is

responsible for taxes prior to delivery. C.J.A. 336, 394.[31]

- In enrichment contracts, the utility owns the depleted tails material unless the parties agree under the contract that the enricher will dispose of the waste material. C.J.A. 25, 96, 129-30, 198, 274. In EUP contracts, the enricher owns and is responsible for disposition of all depleted tails materials without the need for allocation in the contract. *See generally* C.J.A. 325, 378 (no tails material responsibility allocation).

Most fundamentally, the contracts at issue are entitled "Uranium Enrichment Services Contracts." They describe transactions in which utilities deliver uranium feedstock they own for processing by an enrichment services provider for a fee based on the amount of service provided. *See, e.g.*, C.J.A. 10, 17, 26. Every statement by enrichers – including USEC and its predecessor DOE prior to this case – characterized these transactions as sales of services. *See, e.g.*, *USEC Annual Report* (2000), J.A. 51 ("USEC, a global energy company, is the world leader in the sale of uranium fuel enrichment services . . ."), 53 ("Substantially all of USEC's revenue is derived from the sale of uranium enrichment services, denominated in SWU."). All of the

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[31] In certain enrichment contracts the utility may request that the enricher handle the payment of foreign taxes because the U.S. utility may be unfamiliar with tax procedures in other countries. *See, e.g.*, C.J.A. 135-36, 300-01. Contractual delegation of responsibility notwithstanding, as the uranium's owner the utility is ultimately responsible for payment of all property taxes on the uranium being enriched.

evidence confirms that the transaction entered into by the parties is for the provision of services rather than the purchase of goods.[32]

Ultimately, Petitioners argue that Commerce should be allowed to invent sales of subject merchandise for purposes of the antidumping law when the parties to the transaction do not actually intend for there to be a sale. USEC Brief at 50; Gov't Brief at 52. Because the parties did not intend to exchange ownership, however,

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[32] USEC and the Government argue that enrichment is not really a service because it results in the production of a tangible good, citing to 19 U.S.C. § 2114b(5), or because it involves a "major manufacturing process." USEC Brief at 42; Gov't Brief at 25. Section 2114b(5) has no relation to the antidumping law, and includes "construction," which like enrichment results in the production of a tangible good. Moreover, the United States and other countries negotiating under the World Trade Organization's General Agreement on Trade in Services ("GATS") included uranium manufacturing services "on a fee or contract basis" as services covered by the GATS, which does not provide an antidumping remedy for sales of services. *See* Central Product Classification Division 88, J.A. 190. Finally, Commerce declares that it does not consider a "major manufacturing process" to be a "service," *Final Determination*, Gov't App. 240a, yet its own tolling regulation treated the provision of toll manufacturing services as a service. *See, e.g., TSMC Remand Redetermination* at 4 (text between nn.8-9) ("[T]he sale by the [toll manufacturer] is only a sale of the service it performed . . . ."). The service provided in *TSMC* – taking a semiconductor design and using it to produce finished semiconductors – was certainly a "major manufacturing process," yet Commerce had no difficulty treating it as a service. The distinction between sales of goods and services is not the activity being performed, but what is being sold.

the price they negotiated did not reflect the full value of the goods, and there could not have been dumping.

II. The *Eurodif* Decisions Do Not Create A Loophole In The Antidumping Law

USEC and the Government attempt to shore up their legal arguments by claiming that the *Eurodif* decisions create a "roadmap" for foreign manufacturers and U.S. importers to evade the antidumping law. According to USEC and the Government, consumers of steel, wood, semiconductors and other imports will restructure their purchase transactions into sales of toll services to avoid the antidumping law if the Court allows the *Eurodif* decisions to stand. USEC Brief at 54; Gov't Brief at 34-37. Even if this were true, Commerce could not ignore the unambiguous language of the governing statute to avoid what it deemed to be an undesirable result. In any event, the loophole argument is a "straw man" with no legal merit, for one simple reason: imported merchandise is always subject to the antidumping law if it is sold at less than fair value within the United States. U.S. companies already contract for toll services in producing steel products and semiconductors overseas for use in the United States, yet such goods imported under toll services contracts have been routinely subject to the antidumping law when those goods are sold by the owner in a subsequent transaction. *See, e.g.*, tolling cases cited *supra* at 33-35. Only goods that are never sold, and therefore cannot be dumped, are outside the scope of the antidumping law.

The Government argues that toll enrichment contracts must be subject to the antidumping law

because Commerce may not impose antidumping duties based on post-import transactions. It concedes the agency may base a dumping determination on downstream sales when the importer and the seller are affiliated, but claims, erroneously, that Commerce may not rely on downstream sales when the parties are unaffiliated (*e.g.*, in toll service transactions). Gov't Brief at 37. Both the statute and Commerce's "case-by-case" application of the tolling regulation empower the agency to make dumping determinations and impose antidumping duties based on "the first sale in the distribution chain by the company that is in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market." *TSMC Remand Redetermination* at 4 (text between nn.4-5); 19 U.S.C. § 1677a. Whether that first sale takes place before or after importation is irrelevant.

In fact, contrary to the Government's claims, Gov't Brief at 36, Commerce can base a dumping determination on post-import sales of subject merchandise even if that merchandise has been further manufactured or incorporated into another article.[33] In those circumstances, the antidumping law allows Commerce to determine a price for the imported merchandise by deducting from the sale price any value added in the United States by that further manufacturing, regardless of any affiliation between the

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[33] For example, Commerce has stated that "where rollerchain constitutes the subject merchandise and enters the United States, but the first sale to an unaffiliated purchaser is the sale of a motorcycle that contains the roller chain, the law is applicable to such entries of rollerchain." *Final Determination*, Gov't App. 233a.

producer and the entity performing the further manufacturing. 19 U.S.C. § 1677a(d) ("[T]he price used to establish constructed export price shall also be reduced by – (2) the cost of any further manufacture or assembly ...."); *see also NSK Ltd. v. United States*, 245 F. Supp. 2d 1335, 1365 (Ct. Int'l Trade 2003) (even in unaffiliated transactions "Commerce must reduce the price used to establish [constructed export price] by ... certain expenses resulting from further manufacturing ... after importation ..."); *Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 Fed. Reg. 3,822 (Dep't of Commerce Jan. 24, 2006), Issues and Decisions Memorandum at 5, *available at* http://ia.ita.doc.gov/frn/index.html (explaining that costs of further manufacturing can be removed from constructed export price "whether the further processing is done by an affiliated party or by an unaffiliated toller").

Under section 1677a(d), for example, toll manufactured steel plate imported to make automobiles can be subject to a dumping determination based on sales of the automobiles; toll produced lumber imported and used to produce furniture would be subject to a dumping determination based on sales of the furniture; and toll produced semiconductors imported and incorporated into computers would be subject to a dumping determination based on sales of the computers. In no case would Commerce be prohibited from making a dumping determination based on actual sales of goods in the United States just because those goods were imported under a toll services arrangement and then further manufactured in the United States. *Cf.* H.R. Rep. No. 103-316 at 825-26 (2nd Sess. 1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4165 (noting that under Section 1677a(e), "the imported components will not be

exempt from antidumping duties").[34] Only if the imported merchandise is never sold in any form is Commerce prevented from determining whether dumping is occurring, because in that case there are no sales that could constitute dumping.[35]

USEC and the Government have not identified a case in which other industries imported toll produced goods that were never sold in a subsequent transaction, or where importers restructured their purchase transactions in order to take advantage of the *Eurodif* decisions. USEC Brief at 55-59; Gov't Brief at 10, 34-39. The fact that importers are not restructuring their transactions to take advantage of *Eurodif* (and, indeed, could not do so without committing economic suicide by eliminating all domestic sales of toll produced imported goods) demonstrates the fallacy underlying the argument that *Eurodif* has opened a loophole in the antidumping law.

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[34] Section 1677a(e) specifically refers to transactions by affiliated parties, but the same principle applies to unaffiliated transactions under Section 1677a(d)(2).

[35] The Government suggests that importers could evade the antidumping law by toll producing manufacturing equipment for their own use. Gov't Brief at 36. In the unlikely event there were an established industry practice for manufacturers to produce their own manufacturing equipment through tolling contracts, then as with LEU imported under enrichment services contracts, there would be no sale of subject merchandise and no dumping. That is not a loophole; rather, it is the application of the statute as enacted by Congress.

Commerce retains authority to remedy situations in which there has been actual circumvention of the antidumping law. *See* 19 U.S.C. § 1677j. However, it is uncontested that the transactions at issue in this case were not set up to evade the law. As the CIT noted:

> As we stated in *USEC I*, "[t]he crucial finding in *Polyvinyl Alcohol from Taiwan* was that, under the circumstances, Perry had simply restructured its payments to Chang Chun in an effort to circumvent the antidumping duties." . . . Unlike the contract referred to in the *Remand Redetermination*, the SWU contracts here are not simply restructured purchase contracts.

USEC II, 281 F. Supp. 2d at 1341 n.7, Gov't App. 48a-49a (internal citations omitted). Indeed, the Government admits that the use of enrichment services contracts was established by the U.S. Government itself in the 1960s. Gov't Brief at 5 n.2 (quoting *USEC I*, 259 F. Supp. 2d at 1316, Gov't App. 185a-87a). Because enrichment services contracts are not circumvention, they are not sales of subject merchandise under the antidumping statute.

III. Petitioners' Claims That The Eurodif Decisions Negatively Impact U.S. Foreign Policy And National Security Interests Are Inapposite And Factually Incorrect

USEC and the Government argue that U.S. energy, national security and foreign policy objectives support overturning the *Eurodif* decisions. USEC Brief at 55-59; Gov't Brief at 37-39. They claim that without antidumping restrictions on Russian commercial enrichment services, Russia will abandon the HEU Agreement and threaten USEC's ability to support U.S. defense programs. These policy arguments are irrelevant to the legal issues at bar, which involve application of the antidumping law to sales of French enrichment services. Policy determinations on the best way to maintain defense programs and whether or how the government should give special support to a private company such as USEC are appropriately left to Congress, not the courts. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000) ("It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome . . . is a task for Congress, not the courts . . . ," citing *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998)). Even on their face, however, the policy arguments made by USEC and the Government are unsupported by the facts. The *Eurodif* decisions neither undermine U.S. defense programs nor create an incentive for Russia to abandon the HEU Agreement at any time before its expiration in 2013.

USEC suggests that allowing sales of Russian commercial enrichment services would harm USEC commercially and consequently undermine U.S. production of tritium used for nuclear weapons and the supply of HEU for the U.S. Navy. USEC Brief at 55. There is no basis, however, for USEC's implicit claim that its financial success is critical to the U.S. Government's supply of enriched uranium for defense needs. Rather, the United States can readily obtain enriched uranium from its own HEU surplus stockpile, from private companies specifically licensed to supply fuel to the Navy, and if necessary by taking over the enrichment facilities it leases to USEC.

Specifically, after the Cold War the United States was left with a stockpile of enriched uranium sufficient to cover U.S. defense and nuclear propulsion needs for the next fifty years or more. International Panel on Fissile Materials, *Global Fissile Material Report* at 11 n.19 (2007), *available at* http://www.fissilematerials.org/ipfm/site_down/gfmr07.pdf (noting 40-60 year stockpile of naval reactor fuel and reporting Energy Secretary Bodman's comment that the stockpile "will have the added benefit of postponing the need for construction of a new uranium-enrichment facility for at least fifty years"); Dep't of Energy, *HEU: Striking A Balance* 37-46 (2001), *available at* http://www.ipfmlibrary.org/doc01.pdf (describing U.S. HEU stockpiles and needs). The U.S. Government can obtain its tritium either from this stockpile or by recycling tritium from nuclear warheads being decommissioned as part of its nuclear arsenal reduction process. *See, e.g.*, Congressional Research Service, *Issue Brief 97002:*

The Department of Energy's Tritium Production Program (1997), *available at* http://handle.dtic.mil/100.2/ADA323809. USEC does not supply enriched uranium or enrichment services to the Navy; a company named Nuclear Fuel Services is the only supplier of fuel for the Navy. *See* Daniel Horner, *Babcock and Wilcox to Acquire Downblending Competitor*, Nuclear Fuel, 2008 WLNR 17017489, Aug. 25, 2008. In any event, the U.S. Government owns both the enrichment facilities leased by USEC and could reclaim those facilities if additional enrichment were needed for tritium production or the Navy. *See USEC Prospectus* (1998), J.A. 76.

Petitioners assert that interpreting the statute to disallow unlawful antidumping restrictions on enrichment services would undermine the HEU Agreement. Gov't Brief at 37-39; USEC Brief at 55-59. However, the purpose of the HEU Agreement was not to subsidize a private company by giving it monopoly control over enrichment services from Russia. Rather, the HEU Agreement was negotiated as a government-to-government agreement to provide for the downblending of Russian HEU, keeping Russian nuclear experts employed to discourage proliferation activities, and providing funding for Russia to secure its nuclear materials. Thomas Neff, *Privatizing U.S. National Security: The U.S.-Russian HEU Deal At Risk*, Arms Control Today, Aug.-Sept. 1998, *available at* http://www.armscontrol.org/act/1998_08-09/tnas98. The Agreement's purpose was to provide for the downblending of weapons material in a way that

maximized the overall economic benefit for both parties. *See* HEU Agreement Art. I.[36]

Petitioners' speculation that Russia will abandon the HEU Agreement if commercial sales are permitted is baseless for several reasons. First, the Russian parliament recently voted overwhelmingly to continue government-to-government nuclear nonproliferation programs with the United States, including the HEU Agreement. *See* Sen. Richard Lugar, *Trust Still Needs Verification*, Wash. Times, July 18, 2008.[37] Second, blending down HEU provides Russia with access to the underlying uranium, which is currently in short supply in Russia. *Uranium from Russia*, USITC Pub. 3872, Inv. No. 731-TA-539-C (2nd Rev.) (Aug. 2006), at 39-41 (Lane, dissenting) (noting tight Russian supply, and citing World Nuclear Ass'n, *The Global Nuclear Fuel*

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[36] *See* HEU Agreement *supra* n.19. The Government and USEC suggest that the Russian Suspension Agreement was designed to block commercial enrichment services so that the HEU Agreement would be successful. If that were the case, the Suspension Agreement would not have had an initial termination date of 2004 when the HEU Agreement was expected to continue until 2013.

[37] A USEC representative was recently quoted as stating that "[t]he company has been given 'no reason for concern' that it might lose its Russian supply [of enrichment services] over the situation in Georgia." G. Sam Piat, *USEC Doesn't Expect Materials to be Cut Off*, Portsmouth Daily Times, Aug. 18, 2008, *available at* http://www.portsmouth-dailytimes.com/ articles/ 2008/08/18/news/7news_usec.prt. USEC's argument in this case that it expects Russia to breach the HEU Agreement for commercial reasons, while simultaneously disclaiming concern over the current geopolitical situation between the United States and Russia, rings hollow.

Market – Supply and Demand 2005-2030 (2005) ("WNA, 2005"), at Figs. 5.5-5.7), *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3872.pdf. Russia needs that uranium to supply its own nuclear power plants as well as the many nuclear power plants being built in China and India. *Id.* at 41, 43 (citing WNA, 2005 at 180). Third, U.S. utilities have already entered into long term contracts for the great majority of their demand for enrichment services over the next five years, leaving relatively little available demand potentially to be filled by Russian commercial SWU, which itself has been largely committed under long term contracts to non-U.S. customers. *Id.* at 44-45. Consequently, it would be commercially illogical for Russia to abandon guaranteed sales to USEC under the HEU Agreement in favor of unlikely sales to U.S. utilities during that time period.

In sum, USEC and the Government provide no reasonable justification for this Court to overturn the settled and unambiguous meaning of the antidumping law in order to accommodate purported policy concerns that have nothing to do with the subject of that law.

CONCLUSION

For the foregoing reasons, the *Eurodif* decisions should be affirmed in their entirety.

Respectfully submitted,

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